Stark Electric, Inc. *and* International Brotherhood of Electrical Workers, Local 317, AFL–CIO. Case 9–CA–33933

November 7, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On April 29, 1997, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the recommended remedy as modified and the recommended Order as modified.[3]

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily laid off Eric Wilburn, Dwayne Pennington, and Michael Price in May 1996, we shall order it to offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority rights or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The complaint alleges, inter alia, that the Respondent violated Sec. 8(a)(3) and (1) by laying off employees Eric Wilburn, Dwayne Pennington, and Michael Price. The judge correctly found that the Respondent violated the Act by including these three employees in a larger layoff intended to discourage union activity. *NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 510 (4th Cir. 1991) (''Layoffs intended to 'discourage membership in any labor organization' violate the NLRA, even if the employer wields an undiscerning axe, and anti-union employees suffer along with their pro-union counterparts'').

[3] The judge has in his recommended remedy incorrectly addressed issues normally left to compliance. We modify the judge's remedy and recommended Order to provide the Board's usual reinstatement and make whole provisions. The Respondent may litigate appropriate remedial issues at the compliance stage of the proceeding. See *Dean General Contractors*, 285 NLRB 573 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Stark Electric, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) Within 14 days from the date of this Order, offer Eric Wilburn, Dwayne Pennington, and Michael Price, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.''

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

''(b) Make Eric Wilburn, Dwayne Pennington, and Michael Price whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of the Board's decision.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off or otherwise discriminate against any of you for supporting Local 317 of the International Brotherhood of Electrical Workers or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT coercively disparage any union in a manner that impliedly threatens employees who support the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer Eric Wilburn, Dwayne Pennington, and Michael Price, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make Eric Wilburn, Dwayne Pennington, and Michael Price whole for any loss of earnings and other benefits suffered as a result of the action against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the lay offs of Eric Wilburn, Dwayne Pennington, and Michael Price, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the lay offs will not be used against them in any way.

STARK ELECTRIC, INC.

Eric Oliver, Esq., for the General Counsel.
James W. St. Clair, Esq. (St. Clair and Levine), of Huntington, West Virginia, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Huntington, West Virginia, on February 5, 1997. The charge was filed June 3, 1996,[1] and the complaint was issued October 2, 1996.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Stark Electric, Inc., a corporation, is an electrical contractor with a headquarters office in Huntington, West Virginia, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside of West Virginia. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that Respondent, through Bill Stark, its principal shareholder and field supervisor, violated Section 8(a)(1) in interrogating a job applicant about his union sympathies, threatening employees by saying that he would run ''union guys'' off his jobsites and making other derogatory comments about union members. He also alleges that Karen Stark, Bill Stark's daughter, who is president and office manager of Stark Electric, also interrogated an employee about union activity. Finally, the General Counsel alleges that Respondent violated Section 8(a)(1) and (3) by laying off employees Michael Price, Eric Wilburn, and Dwayne Pennington at the end of May because it knew or suspected that they had engaged in union activity. For the reasons stated below I find that Respondent violated the Act as alleged.

[1] All dates are in 1996 unless otherwise indicated.

Respondent's work force expands during the spring of 1996

Respondent is an electrical contractor which performs work primarily at commercial sites in the tri-state area near Huntington, West Virginia (West Virginia, Kentucky, and Ohio). At the beginning of 1996, Stark Electric had only two workmen on its payroll, Mike Hickman and Anthony Napier. By the end of January it had five electricians; Hickman, Napier, Terry Quintrell, Jim Downs, and Mark Childers.[2] Except for Napier, these five worked continuously for Stark at least through the end of July. Napier last worked for Stark on April 5. On April 1, Michael Mayo, who had worked for Stark on and off since 1992, began working at the Huntington Blood Bank, a project that extended into June.

In mid-March, Respondent began work installing the wiring and electrical fixtures at a Lone Star steakhouse in the Huntington area. In mid-April, Stark began doing similar work at an Applebee's restaurant. These projects apparently caused Stark to hire additional employees.

Michael Price began working for Respondent as an electrician on April 9. He had been working previously in North or South Carolina. When he called Respondent, Price told Bill Stark that he wanted to move back to the Huntington area. Stark initially assigned Price to work on the Lone Star project. He was not told how long his employment would last or that the length of his employment would depend on the duration of particular projects.

Tim Stidham began working at Lone Star on April 15 and Kyle Jackson worked there for part of 1 day, April 19. During the week of April 27, three new employees began work for Stark; Joseph Gregory, Joel Stidham, and Joseph Rose. Price did not work that week due to injuries sustained in an automobile accident.

Price returned to work on April 29 and spent most of the following week at the Applebee's project. On May 3, Dwayne Pennington also began working at Applebee's. Joel Stidham's last day with Respondent was May 2, and Joseph Gregory's was April 29. On May 7, Eric Wilburn began working for Respondent on the Blood Bank project. Like many of Stark's employees, he worked on other projects as well. On Friday, May 10 and 11, John Sharkey, who also had a job with another construction company, worked for Stark at the Lone Star steakhouse. Neither Pennington nor

[2] I accept Exh. R-3, which is a copy of Stark Electric's payroll, at face value. I credit this document over all contrary oral testimony with regard to the dates of employment of Stark employees. However, I do not credit the calculations made by Karen Stark in colored ink at the bottom of the sheets for the weeks ending May 18 through June 15, with regards to the numbers of hours worked at the Lone Star and Applebee's restaurants. These calculations were apparently made in preparation for this hearing and are in some respects inaccurate. For example, my calculations of the hours worked for the week ending June 1 are 109 hours at Lone Star and 154.5 at Applebee's.

Wilburn were told how long they would be employed by Respondent.

Respondent's employees sign union authorization cards; the Union sends Respondent a letter

After work, on May 14, Price and Pennington met with Sherman Nicholas, the organizing coordinator for IBEW Local No. 317 in a parking lot adjacent to the Applebee's project. The two electricians signed cards authorizing the Union to represent them. While they were talking to Nicholas, Mike Hickman, another Stark electrician walked past them.

Soon after leaving Price and Pennington, Nicholas wrote the following letter to Bill Stark:

> The purpose of this letter is to make you aware that this office is assisting a group of your employees who wish to organize and join the International Brotherhood of Electrical Workers.
>
> At no time will we attempt to disrupt your work nor will we engage in any activities not protected under the National Labor Relations Act.
>
> Also, I would like to invite you to meet us to discuss the benefits of being a Union contractor. If you would like to talk to us concerning either of these matters, you can contact myself or Business Manager, William Taylor, at the above address and phone number. [G.C. Exh. 5.]

The size of Respondent's work force contracts after the union letter is received

Nicholas' letter was received by Karen Stark on May 16. That day Eric Wilburn signed an authorization card at the Union hall. He also encouraged other employees to join the Union. Sometime in May, Michael Mayo also signed a union authorization card. Neither Price, Pennington, Wilburn, nor Mayo informed Respondent that they had signed authorization cards. There is no evidence that Stark knew which employees had signed the cards or were otherwise sympathetic to the Union.

Friday, May 17, was the last day that Joseph Rose worked for Stark. Friday, May 24, was the last day that Tim Stidham and Eric Wilburn worked for Respondent. Both were working that day at the Lone Star project. Tim Stidham had a heated argument with Bill Stark just before leaving the jobsite.[3] A few hours later Stark approached Wilburn and told him that his services were no longer needed.

John Sharkey did not work for Respondent during the week of May 12–18. During the week of May 19–25, he worked 27-1/2 hours at Lone Star. Saturday, May 25, was the last day he worked for Stark. Jim Shope, who had not worked for Stark previously, worked 8 hours per day, May 23–25.

May 27 was the last day that Michael Price and Dwayne Pennington worked for Respondent. Bill Stark told Pennington, who was on the Applebee's project that day, that he wasn't happy with his work. Previously any comments he made to Pennington about his work were complimentary.[4] Price worked 6 hours on the Lone Star project on May 27. Late in the afternoon Karen Stark told Price that Respondent had no more work for him.

The number of hours worked by Respondent's electricians decreased markedly after May 25

Exhibit R-3 demonstrates that the number of hours worked by Stark electricians decreased markedly after May 25. The following is a summary of the hours of labor for which Respondent's employees were paid for electricians' work for the week ending May 4 to the week ending June 22:

Week Ending	*Regular Hours*	*Overtime Hours*
May 4	353.5	51
May 11	406.5	0
May 18	402.5	40.5
May 25	431	31
June 1	263.5	23
June 9	230	1.5
June 15	265	8.5
June 22	278	.5

Respondent hires Kevin Scaggs and Terry Hundley after layoffs

Two days after Price and Pennington were laid off, a new employee, Kevin Scaggs started working at Lone Star. Respondent offered no evidence as to why it hired Scaggs at this time. He continued to work full-time for Respondent at least through the end of July. Jim Shope, who had a full-time job with another company, worked 8 hours at Applebee's on June 1.

After laying off Price and Pennington and hiring Scaggs, Respondent had six full-time electricians working for it. These were the four employees who had been with Stark since January (Hickman, Quintrell, Downs, and Childers), Mayo who had worked for Stark in prior years and Scaggs. No employee, other than Scaggs, who had been hired since April 1 was still working for Respondent.

On June 11, Terry Hundley began working for Stark at the Blood Bank project. He worked on several different Stark projects through July 10.

Interrogation and derogatory comments about the Union made by Respondent

During Dwayne Pennington's preemployment interview, Bill Stark asked him if he was a union member. Stark told him about three or four union members who had brought a camera with them when they filed employment applications. Stark then asked Pennington, ''you're not one of those Union bastards?''[5]

---

[3] There is no evidence as to the subject of the argument.

[4] Pennington testified that he wore an IBEW T-shirt to work the previous workday. The record does not indicate whether Respondent was aware of this when it laid him off.

[5] Bill Stark, who was present at the hearing was not called by Respondent as a witness. I credit Pennington's testimony about these statements in view of the fact that it is uncontradicted and consistent with the testimony of Price and Wilburn. Michael Mayo did not testify about any derogatory comments made by Bill Stark regarding the Union.

On a couple of occasions after Pennington started working, Bill Stark asked him if he had seen Union Organizer Nicholas on the jobsite. One day Stark said he had to go to another site because ''that SOB Union organizer'' was there. When Stark returned he said he just missed Nicholas, but would like to get his hands on him.

Eric Wilburn also heard Stark make derogatory comments about the Union. Stark said Union men were lazy, that the Union protected the lazy and that he wouldn't have any union members working for him. The Tuesday after he was laid off Wilburn went to Respondent's office to pick up his check. When he asked Karen Stark whether there would be work for him in the future, she replied, ''Aren't you one of the ones that joined the Union.''[6]

Michael Price heard Stark say on one occasion that the Union SOBs had called the fire marshall and as a result he had to send all the employees at Lone Star home. On another occasion he heard Stark say that if caught the union SOBs on the Lone Star job, he would run them off. Once while Price and another employee were on a break, Stark drove by and yelled that his job was not a union job and therefore employees were entitled to a 10-minute break, not 15 minutes.

Analysis

The lay offs of Eric Wilburn, Dwayne Pennington, and Michael Price violated Section 8(a)(1) and (3)

In order to prove that an employer violated Section 8(a)(1) and (3) in terminating or laying off an employee, the General Counsel must show that union activity has been a substantial factor in the Employer's decision. Then the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in union or other protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

To establish discriminatory motivation the General Counsel generally must show union or other protected activity, employer knowledge of that activity, animus, or hostility towards that activity and an adverse personnel action. Inferences of knowledge, animus, and discriminatory motivation may be drawn from circumstantial evidence rather than from direct evidence. However, when the dismissal of an employee is part of a larger layoff, made in whole or in part to discourage union activity, the General Counsel does not have to establish that the employer was aware of the union sympathies of each of the terminated employees. *Davis Supermarkets*, 306 NLRB 426 (1992), enfd. 2 F.3d 1162, 1168 (D.C. Cir. 1993); *Alliance Rubber Co.*, 286 NLRB 645, 647 (1987), *NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 510 (4th Cir. 1991). In *Activ Industries*, 277 NLRB 376 fn. 3 (1985), the Board stated:

> In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by terminating 10 employees, we emphasize that it is the Respondent's mass discharge, and not its selection of employees for the discharge, that is unlawful. Accordingly, the General Counsel was not required to show a correlation between each employee's union activity and his or her discharge . . . Instead, the General Counsel's burden was to establish that the mass discharge was ordered to discourage union activity or in retaliation for the protected activity of some.

While Respondent's payroll records indicate a valid economic reason for some layoffs at the end of May, the hiring of Kevin Scaggs establishes that some others lacked economic justification and were thus discriminatorily motivated. Given the timing of the layoffs, the timing of Scaggs' employment and the animus demonstrated by Bill Stark (and to some extent Karen Stark) to the Union, I infer the decision to layoff at least some of the newer employees was made to thwart the Union's organizational drive.

With the exception of Karen Stark's remark to Wilburn, there is no direct or circumstantial evidence from which I can conclude that Respondent knew the identities of the employees favoring the Union. Although Dwayne Pennington described Mike Hickman, the electrician who saw Pennington and Price talking to organizer Nicholas, as a foreman, there is no substantial evidence that Hickman was a supervisor or agent of Respondent. Similarly, although Pennington wore a union T-shirt to work the day before he was fired, there is no evidence that any supervisor saw him or was told that he did so.

Further, I infer that Respondent's failure to recall any of the laid-off employees indicates antiunion motivation in determining the size of the layoff.[7] Eric Wilburn made his interest in a recall clear to Karen Stark when he went to Respondent's office to pick up his last pay check. Respondent has offered no valid business justification for hiring Scaggs so soon after the layoffs, or hiring Terry Hundley 2 weeks' later without inquiring whether any of its former employees were interested in being recalled.[8] Thus, I conclude that the General Counsel has made a prima facie case of discrimination which the Respondent has not even attempted to rebut.

One cannot determine from the instant record, which of the laid-off employees would have been retained if Respondent's layoff had been conducted in a nondiscriminatory manner. That remains to be determined in the compliance stage of this proceeding.

Respondent violated Section 8(a)(1) in interrogating Dwayne Pennington about his union sympathies in his preemployment interview and by making other threatening or coercive remarks about the Union

Whether questions concerning an employee's union membership are lawful depends on whether they tend to restrain or interfere with the employee's exercise of rights guaranteed by the Act, *Rossmore House*, 269 NLRB 1176 (1984). Such

[6] I credit Wilburn's testimony at Tr. 13 and 25 in this regard over Karen Stark's general denial at Tr. 118.

[7] There is no evidence as to Respondent's practices or procedures regarding recalls.

[8] Absent additional information I cannot infer, as suggested by the General Counsel, that estimator Tim Dickson, electrician Jim Downs and electrician Marc Childers worked at Applebee's and Lone Star after the layoff in order to enable Respondent to discharge possible union supporters. In this regard I would note that prior to the layoff, Dickson performed 8 hours of electrician's work at Lone Star on April 27 and another 8 hours on May 4. Downs worked 4 hours at Applebee's on April 13.

inquiries made during a job interview, however, are inherently coercive. *Gilbertson Coal Co.*, 291 NLRB 344 (1988). Further in the instant case Bill Stark's inquiry to Dwayne Pennington as to whether he was ''one of those union bastards'' would be coercive in any context.

Similarly, Karen Stark's inquiry, or observation, to Eric Wilburn about his union sympathies is clearly coercive because it was made when he inquired about the possibilities of more work. The other statements made by Bill Stark, disparaging the Union and impliedly threatening union supporters, also tended to restrain, interfere or coerce employees from exercising their Section 7 rights.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off some of its employees in May 1996, must make whole for any loss of earnings and other benefits, those whom the Respondent would not have laid off but for its discrimination against them, including amounts they would have earned on other jobs to which Respondent subsequently would have assigned them. If it is shown at the compliance stage of this proceeding that the Respondent, but for the discrimination, would have assigned any of these discriminatees to present jobs, the Respondent shall hire those individuals and place them in positions substantially equivalent to those from which they were laid off. Backpay shall be computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Stark Electric, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Firing, laying off, or otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

(b) Coercively interrogating any employee about union support or union activities.

(c) Coercively disparaging any union in a manner that impliedly threatens employees who support the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole any of the following employees for any losses they may have suffered by reason of Respondent's discriminatory layoff in May 1996, as determined in the compliance stage of this proceeding. Offer those employees who would currently be employed but for the Respondent's unlawful layoff, employment in substantially equivalent positions to those they held prior to the layoff, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against by Respondent:

Eric Wilburn, Dwayne Pennington, and Michael Price.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful lay offs and notify the employees in writing that this has been done and that the lay offs will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Huntington, West Virginia office copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 3, 1996.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(e) Within 14 days after service by the Region, mail a copy of the attached notice marked ''Appendix''[11] to all employees who were employed by the Respondent as electricians at any time from April 9 through July 10, 1996. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.[12]

[11] See fn. 10, supra.

[12] On April 4, 1997, the General Counsel filed a motion to reopen the record in the instant matter and consolidate it for hearing with Case 9–CA–33816. This motion is DENIED for the following reasons. The General Counsel states that Case 9–CA–33816 involves a charge filed by the Union on April 17, 1996, alleging the Respondent refused to hire Sherman Nicholas and several other union members on or about March 28, 1996. The Region notified the Union on October 31, 1996, that it was declining to file a complaint with regard to this charge and the Union appealed. The appeal was sustained on March 26, 1997, after the hearing had been held and the briefs filed in the instant case. Even though this case involves the same parties and arguably related matters, I conclude that judicial economy and administrative efficiency are not served by delaying resolution of the instant matter. Moreover, since the Region, as of the date on the instant hearing, deemed Case 9–CA–33816 to be unsuitable for litigation, it would not be precluded by virtue of the Board's decision in *Jefferson Chemical Co.*, 200 NLRB 992 (1972), from litigating that complaint in a separate proceeding.